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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVEN L. CONTURSI, Plaintiff and Appellant, v. MICHAEL A. CARABINI et al., Defendants and Appellants.	G042098 (Super. Ct. No. 01CC00444 consol. with No. 01CC02996) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed in part and reversed and remanded in part.

Good, Wildman, Hegness & Walley, Gary A. Dapelo; Snell & Wilmer, Richard A. Derevan and Todd E. Lundell for Plaintiff and Appellant.

Pistone & Wolder, Thomas A. Pistone, Aaron C. Watts; Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Defendants and Appellants.

* * *

Plaintiff Steven L. Contursi and defendants Michael A. Carabini and Monex Rare Coins, LLC, are in a long-running dispute about the windup and dissolution of Monex, a wholesaler of rare coins. In our prior opinion we interpreted applicable provisions of their operating agreement, determining Carabini had breached the agreement by failing to value plaintiff's interest in the company and allow him to purchase inventory of coins. (*Contursi v. Carabini* (Jun. 28, 2006, G032444) [nonpub.opn.], p. 2.) We reversed that portion of the judgment, directing the superior court to decide plaintiff's resulting damages. (*Ibid.*)

After a retrial on the issue of damages the court found plaintiff had not proven damages for defendants' failure to value the coin inventory. Plaintiff appeals, claiming there is sufficient evidence in the record to prove his damages. We agree and remand to the trial court to modify the judgment to provide for an award of $2,023,408 plus prejudgment interest on that amount at 10 percent per annum from January 31, 2000.

Defendants cross-appeal, arguing the court erred in awarding prejudgment interest on amounts awarded in the original judgment as determined by the accounting and for the amount to reimburse plaintiff for Monex's payment of attorney fees and costs in defending the action against Carabini's breach of contract and the covenant of good faith and fair dealing. We agree interest was not proper because the amounts were not certain or capable of being made certain and were not contract damages and reverse the judgment to the extent it awards interest on those amounts.

FACTS AND PROCEDURAL HISTORY

The basic facts underlying the dispute are essentially set out in our prior opinion as is the history of the first trial. (*Contursi v. Carabini*, *supra*, G032444,

pp. 3-8.) In short, in 1997 plaintiff and Carabini, with others, entered into an operating agreement to form Monex, a rare coin wholesaler. (*Id*. at p. 3.) Carabini was the majority shareholder and plaintiff was the day-to-day manager. (*Ibid*.) In late 2000, Carabini terminated plaintiff as the manager and notified him one of the offices would close. (*Id*. at p. 4.) Plaintiff objected and notified Carabini he would withdraw from Monex unless Carabini rescinded those decisions. (*Id*. at pp. 4-5.) The operating agreement contained ambiguous provisions dealing with withdrawal of a shareholder, which we construed in our first opinion. We concluded the operating agreement required that within 30 days of plaintiff's withdrawal defendants were required to value his interest in Monex and allow him to purchase the inventory of coins at 110 percent of their liquidation market value. (*Id*. at pp. 8-9, 11.) This was to give effect to plaintiff's intent to be able to withdraw quickly from Monex and continue to sell coins in another business. (*Id*. at p. 11.)

We also held Carabini had breached the operating agreement and his duty of good faith and fair dealing by failing to value plaintiff's interest in Monex and the coins and give him the opportunity to purchase the coins. (*Contursi v. Carabini*, *supra*, G032444, p. 12.) We remanded the case to have the trial court find the amount of damages plaintiff had incurred due to this breach, with the valuation date set at January 31, 2001. (*Id*. at pp. 12, 16.)

At the first trial the court found that the approximately $750,000 in attorney fees and costs Monex had expended in defending Carabini were properly charged to Monex because Carabini had not breached the operating agreement. (*Contursi v. Carabini*, *supra*, G032444, p. 13.) We reversed because Carabini had in fact breached the agreement and the covenant of good faith and fair dealing and some of those fees and

costs had been incurred in defense of those acts. We ordered the trial court to determine the amount Carabini should be required to reimburse Monex. (*Id*. at pp. 13, 16-17.)

At the retrial the parties stipulated that the only issue, as relevant to this appeal, was "[a] determination of the amount of damages, if any, suffered by [plaintiff] based on Carabini's failure to value the rare coin inventory of Monex . . . as of January 31, 2001, under the terms of . . . the . . . [o]perating [a]greement."

Plaintiff testified that for tax purposes, the value of the coins on Monex's books was less than it paid for them and thus less than their market value. Monex's records showed that, during its lifetime Monex had sold coins purchased for slightly more than $40 million at a price of over $50 million. Documents also showed that in the year prior to the dispute, Monex realized over $12 million from the sale of coins, which on average was almost one percent above their "rock value." Rock value was the lowest amount a coin would be sold for, based on all information about the coin, the market, and any other relevant factors. In other words, it was the "rock bottom price." The wholesale price was higher.

The court found proof of rock value was not proof of liquidation market value, as required by the operating agreement. Liquidation market value as used in the operating agreement refers to the value of the coins sold at dissolution. "'[R]ock' is an artificial valuation assigned primarily by plaintiff to the rare coins contained in the Monex inventory," and refers to "'retail value,'" the amount for which Monex would sell the coins to its dealers. Recognizing plaintiff's expertise in the field, the court "discount[ed]" . . . his position" because he was "a very, very biased party, with respect to valuation." The court concluded plaintiff's evidence of rock value was insufficient to support his damages.

The judge also found "plaintiff was badly treated in the termination of this business . . ." and "should have been given every opportunity afforded under the operating agreement to participate in the valuation and/or afforded the opportunity to make the purchase as 110 percent of the liquidation value . . . ." And "while it would have been better to have followed the procedures laid out by [the operating agreement], at the end of the day I cannot find based on the evidence that there was some sort of secret dealing or bad acts or nefarious activity on the part of [defendants] with respect to the marketing and sell-off of the rare coins once [Carabini] elected to just dissolve Monex."

The judgment provided that the court did not agree that plaintiff's damages were "'rock value' or what the rare coins actually sold for" and that plaintiff had not proven damages. It awarded damages of $606,415.50, which included an amount awarded in the first trial pursuant to the accounting plus reimbursement of $399,466.50 in attorney fees and costs Monex had expended defending Carabini on the breach of contract claim, plus interest at 10 percent per annum from January 31, 2001.

Additional facts are set out in the discussion.

DISCUSSION

1. Plaintiff's Appeal

Pursuant to the parties' stipulation the only issue relevant to this appeal is "the amount of damages, if any, suffered by [plaintiff] based on Carabini's failure to value the rare coin inventory . . . as of January 31, 2001 . . . ." Relying on the prior opinion, plaintiff argues that before getting to a valuation of the coins, "the starting point of any damages calculation" was the value of his interest in Monex. Our opinion did order the matter remanded to the trial court to determine plaintiff's damages "based on

defendant's failure to value [plaintiff's] interest and the rare coin inventory . . . ." (*Contursi v. Carabini, supra*, G032444, p. 12.) But that was not the parties' stipulation, which must control. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279.) Therefore, we do not consider plaintiff's interest in Monex as of January 31, 2001 or any other date.

The court found plaintiff had not proven any damages based on defendants' breach of the operating agreement by failing to value the inventory of coins because he had not proven its liquidation market value as the operating agreement provided. What this means is that there was no evidence of the liquidation value of the coins, that, in effect, they were worth nothing. But the record reflects otherwise.

First, contrary to defendants' counsel's claim at oral argument, nothing in the record shows the court found plaintiff was not credible. Second, the amounts necessary to calculate damages were all contained in Monex documents and undisputed by defendants.

Damages for breach of contract must be "clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits [citation] or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled. [Citations.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873-874.)

Plaintiff maintains there were two means by which the coins reasonably could be valued. One, the so-called Deeds method, is based on a formula the parties used to buy out a third shareholder, Stephen Deeds, early in the operation of Monex. The purchase price was not derived from the liquidation market value but instead was based on the book value of Deeds's interest in Monex plus his profit in the inventory of coins, which the parties agreed was 85 percent of the difference between the cost of the coins and their rock value. The court rejected this evidence, finding that using "'rock value' was a convenience acceded to by the parties . . . and not an adopted amendment, supplement, or modification of the operating agreement."

Plaintiff argues this is a reasonable method of valuing the coins because the parties previously relied on it. But, as the trial court noted, just because the parties used that measure to buy out another shareholder does not supply evidence of the liquidation value of the coins, as the operating agreement requires. It did not err in rejecting that formula.

On the other hand, there was evidence of the liquidation value of the coins. When Monex sold off the coins during the period it was dissolving, in May 2001, it obtained a price of $4,102,351. Although not defined in the operating agreement liquidation value generally means "[t]he value of . . . an asset when it is sold in liquidation, as opposed to being sold in the ordinary course of business." (Black's Law Dict. (7th ed. 1999) p. 1549, col. 2.) The amount realized from the sale of the coins during the dissolution of Monex falls squarely within this definition, despite Carabini's testimony that he was trying to obtain market value, not liquidation value. In their trial brief defendants not only concede, but argue in bold face and underlined type, that "the liquidation market value of the rare coin inventory is the price at which [Monex] was able to sell it to a willing buyer at the time of liquidating its assets, here, $4,102,351." (Bold

and underscoring omitted.) And defendants reiterate this in the respondents' brief, stating, "The value at which the rare coins actually sold in dissolution is the best indicator of liquidation market value as set forth in . . . the [o]perating [a]greement." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1112 ["clear and unambiguous" statements of counsel "'may be treated as judicial admissions if they were intended to be such'"].) The price at which defendants sold the coins during the dissolution process is a "reasonable basis of computation." (*GHK Associates v. Mayer Group, Inc., supra,* 224 Cal.App.3d at p. 873.)

Having established there was sufficient evidence of the liquidation value of the coins, we now consider whether plaintiff proved his damages due to defendants' failure to value the coins and allow him to purchase them as of January 31, 2001. Under the terms of the operating agreement, plaintiff had the option to purchase the coin inventory for 110 percent of the liquidation market value. One hundred ten percent of $4,102,351 is $4,512,586.

Plaintiff testified he was willing to buy the coins at that price and even at $5 or $6 million. He also testified he tried to offer to do so but Carabini would not even discuss the matter with him. (See also *Contursi v. Carabini, supra*, G032444, pp. 5-6 [letter from plaintiff's counsel to defendants' lawyer awaiting response to plaintiff's offer to buy Monex or assets and defendants' counsel advising that defendants would not "'entertain any proposals by [plaintiff]'"].) Defendants argue that if plaintiff was willing to buy them for $6 million it would have cost him $6.6 million, because he had to pay 110 percent. But the operating agreement did not require plaintiff to pay 110 percent of what he was willing to pay. Rather, and as defendants argue elsewhere, it called for payment of 110 percent of the liquidation market value.

Defendants rely on Carabini's testimony that plaintiff never offered to buy the coins, just the business. But this does not persuade. First, this does not prove plaintiff was unwilling to purchase the coins and there is no evidence of his unwillingness. Second, pursuant to the operating agreement plaintiff did not have to even offer to buy the coins until after they were valued. (*Contursi v. Carabini, supra*, G032444, p. 11.) Because defendants breached the operating agreement by failing to value the coins, plaintiff's requirement to make an offer to purchase was never triggered. Therefore, his testimony he was willing to do so is uncontradicted and sufficient.

There was also evidence plaintiff had borrowed $2.5 million in mid-January 2001 for the purpose of purchasing the coins, including a promissory note documenting the loan. This would have been sufficient, given his 50.2 percent interest in Monex, and his capital account could have been credited against the price. The coins were shown at a value of $3,969,432 on Monex's balance sheet as of January 31, 2001. Plaintiff claims his purchase at $4,512,586 would have generated a profit of $543,154, 50.2 percent of which, or $272,663, would have been due him. But as defendants point out any profits were divided between the parties pursuant to the accounting set out in the first judgment. And because we are not revaluing plaintiff's interest in Monex as of January 2001, he is not entitled to what would have been the profit from his purchase of the coins.

In addition to that amount, however, a component of plaintiff's damages is his lost profits. (See *GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at pp. 873-874 [where breach of contract deprived the plaintiff of profits from partnership, evidence showing "reasonable basis" for calculation sufficient to uphold award of lost profits].) The parties stipulated the issue was to determine plaintiff's damages resulting from the failure to value the coin inventory. Valuation of the coins was not an academic

exercise but was to provide plaintiff information for him to decide if he wanted to purchase the coins. There is no dispute that the provision in the operating agreement allowing this was to protect plaintiff if Carabini terminated him as Monex's manager. (*Contursi v. Carabini, supra*, G032444, p. 9 [Carabini agreed plaintiff wanted the ability "to quickly resume coin trading if [he] withdrew from Monex"].) Plaintiff "wanted to be able to leave the company as soon as possible, taking his investment, and hav[e] the right to trade coins to earn an income" and "to quickly resume coin trading if [he] withdrew from Monex." (*Id.* at pp. 9, 10.) Thus, the evidence shows plaintiff needed the valuation to be able to purchase the coins and resell them. Defendants' breach of the operating agreement in failing to value the coin inventory prevented plaintiff from doing so, thus causing him to lose profits. They are an appropriate element of damages.

The court specifically found plaintiff's evidence as to the coins' rock value amounted to their retail value, i.e., the price that rare coin dealers would pay for them. And defendants "had little dispute with [plaintiff's] valuation of the inventory at 'rock value' . . . ." They just disagreed that it established liquidation value. Based on undisputed documentary evidence, the rock value at January 31 can be calculated at $6,353,331 as follows: The rock value of coins in Monex's inventory at November 30, 2000, was $7,029,345. In December 2000 and January 2001 Monex sold coins for $676,014. These coins were sold in the normal course of business, not during the later dissolution period. This leaves a value of $6,353,331 for the remaining coins. Monex records showed that over its existence, for coins for which it had paid approximately $40 million, Monex sold them for over $50 million and in the year before the parties' dispute had sold coins for almost one percent above rock value.

Furthermore, plaintiff was in the business of selling rare coins and had almost 35 years' experience in that field, buying and selling approximately $200 million

worth of coins in the seven years before forming Monex. He was the person responsible for the daily operations of Monex (*Contursi v. Carabini, supra*, G032444, p. 3) and set the prices for the coins. Based on all this evidence it is reasonable to believe he could have sold the coins for at least their rock value.

The difference between what plaintiff would have paid Monex and what he could have sold the coins for is $1,840,745. This is the amount of plaintiff's damages.

Plaintiff acknowledges he urged the Deeds valuation at trial and did not supply specific calculations based on this alternative method of valuation. Nevertheless, all of these figures were in evidence and support a finding plaintiff was damaged in that amount. With this evidence in the record the court's finding there were no damages cannot be sustained.

In the trial court plaintiff agreed $120,043 should be deducted from his damages award based on amounts previously paid to him from Monex assets. But this was based on the premise that his value in Monex would be redetermined as of January 31, 2001. Since we have decided that is not a proper calculation due to the stipulation, no sums should be deducted from the amount of his damages.

Defendants assert plaintiff cannot recover because he failed to mitigate his damages. After it was determined Monex would be dissolved, defendants sold off the 816 coins in the inventory. They sold 561 to dealers and the remaining 305 coins at auction. Defendants maintain plaintiff should have purchased some or all of the 305 coins. But there was no reason plaintiff had to do so.

As plaintiff testified, to purchase the coins at auction he would have had to pay the "retail price" as opposed to 110 percent of the liquidation value plus a commission. That would not have been mitigation but instead imposed additional expenses on plaintiff.

Moreover, "in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. (Civ. Code, § 3300.) The aim is to put the injured party in as good a position as he or she would have been had performance been rendered as promised. [Citation.] . . . The burden of establishing mitigation rests with the defendant. [Citation.]" (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 848; see also *Millikan v. American Spectrum Real Estate Services California, Inc.* (2004) 117 Cal.App.4th 1094, 1105 ["'The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract'"].) Defendants failed to carry that burden.

Given that the evidence is in the record, we see no reason to remand this to the trial court to make findings as to the amount of damages. As defendants acknowledge, the amount may be determined by a "simple . . . mathematical calculation." Therefore, we will remand for the trial court to enter a new judgment, deleting the provision that plaintiff was not entitled to damages and adding a provision stating that plaintiff was damaged by virtue of defendants' failure to value the coins in the amount of $1,840,745.

Pursuant to Civil Code section 3287, subdivision (a) a party who is awarded damages that are "certain[] or capable of being made certain by calculation" is entitled to prejudgment interest on those damages. This means defendants must have known the amount due plaintiff or could have computed the amount using information he had or could have obtained. (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 391.) Here defendants could have calculated the amount due plaintiff for their breach. All the amounts in evidence used to determine plaintiff's damages were

available to defendants at the time of the breach in Monex documents. Thus, plaintiff is entitled to interest on $1,840,745 at 10 percent per annum from January 31, 2001.

2. Defendants' Appeal

The judgment awarded plaintiff $606,415.50, comprised of $206,949 due from the accounting conducted at the first trial and $399,466.50 in attorney fees and costs Carabini was to reimburse plaintiff. The judgment also awarded just over $490,000 in prejudgment interest on that amount plus an amount to accrue daily. Defendants challenge an award of any interest on several grounds, including that these awards were not "damages," the amounts were not certain or ascertainable, the request for interest was not timely, and the award was outside the scope of the remand. We agree the amounts were not certain or capable of being made certain under Civil Code section 3287, subdivision (a), nor were they contract damages for which interest would have been allowed under Civil Code section 3287, subdivision (b). We reverse the award of interest on those amounts. Because we decide the issues on this basis we need not discuss any of the other grounds defendants raised.

Generally "an accounting action is prima facie evidence a claim is uncertain." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 909.) Although we do not have the record from the trial on the accounting, our first opinion is instructive. Both parties challenged several items in the accounting, including expenses and salaries Monex paid during the period it was being dissolved. (*Contursi v. Carabini, supra*, G032444, pp. 3, 15.) For example the trial court disallowed $15,000 in salary paid to Carabini but allowed $3,000 for salary paid to another employee. (*Id.* at pp. 15-16.) It also allowed $87,000 in payments to a firm performing accounting work. (*Id.* at p. 16.) We affirmed those findings on appeal. (*Id.*

at pp. 15-16.) It is not reasonable to believe defendants could have been able to calculate what amounts would be approved and which would not.

This is also true for the attorney fees and costs. At the time the litigation began there was no way to know what amounts would be incurred and how much the court would ultimately find could legitimately be paid by Monex to defend the action and the amount Carabini would have to personally bear.

Interest is not entirely foreclosed in an accounting action, however. It may be awarded in cases "where equity demands" it, even where the amount of damages is not certain or capable of being made certain. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc*., *supra*, 149 Cal.App.3d at p. 909.) Plaintiff maintains this is just such a case. In support he cites to three cases, none of which persuades.

In *Luchs v. Ormsby* (1959) 171 Cal.App.2d 377 the plaintiff filed an accounting action based on diversion of partnership funds by the defendant. The court upheld an interest award on the amount awarded, noting that the defendant's "wrongful diverting, expropriation, and receiving, to himself, of partnership moneys [was] . . . extremely inequitable conduct . . . ." (*Id*. at p. 388.) But the court also relied on the rule that "[a] partner may collect interest where partnership funds have been wrongfully withheld or where a partner in charge of firm books wrongfully makes an overdraft. [Citations.]" (*Ibid*.) It also ruled that if the partnership books and records were inadequate it was the defendant's responsibility. (*Ibid*.)

That is not the situation at hand. Although defendants did breach the agreement, including the covenant of good faith and fair dealing, in failing to value the coins, that was not determined until we construed the operating agreement. Moreover, the amounts assessed in the accounting were not merely monies defendants wrongfully diverted.

Likewise, in *Speka v. Speka* (1954) 124 Cal.App.2d 181 the plaintiff received interest on an award resulting from an accounting, where the defendant threatened to kill the plaintiff, who was his brother, and charged him with being dishonest. (*Id*. at p. 186, 187.) Carabini's conduct did not approximate those actions.

Finally, in *Bowman v. Carroll* (1932) 120 Cal.App. 309 the court affirmed an award of interest in an accounting action between two partners where the defendant, who held title to partnership properties, sold them and failed to pay the plaintiff his share, disclaiming the partnership or any duty to transfer any proceeds to the plaintiff. (*Id*. at p. 313.) But there the amount due was easy to calculate.

Plaintiff argues the accounting was necessitated by defendants' failure to value the coins. But many accountings are the result of breaches and most do not award prejudgment interest. Plaintiff's three cases demonstrate the misconduct must be something beyond breach of the terms of the agreement.

Plaintiff asserts it would be equitable for the court to allow interest because he "has had to fight for more than nine years to recover even a portion of what he should have been entitled to in January 2001." We do not deny that he was deprived of sums rightfully his that should have been paid 10 years ago. But he will be compensated for that by the award of interest on the breach of contract damages. For the same reason, contrary to plaintiff's argument, the valuation of the coins does not affect the analysis of the accounting.

Plaintiff also maintains he is entitled to interest under Civil Code section 3287, subdivision (b), which gives the court discretion to award interest on contract damages even where the amount is unliquidated. He contends the amount for the accounting and attorney fees and cost reimbursement "represents the final determination of the amount of [his] interest in Monex." But neither amount can be

considered contract damages. And plaintiff has not cited to any authority to support his argument.

That plaintiff has now prevailed on his breach of contract claim does not affect whether interest is due on the accounting or attorney fee awards, which were not based on contract causes of action. We also reject plaintiff's argument that because the attorney fees and costs Monex properly paid in defending the action are an offset against his interest in Monex, the unliquidated balance of fees still may bear interest. (*Coleman Engineering Co. v. North American Aviation, Inc*. (1966) 65 Cal.2d 396, 409 ["offsets of the defendant, even where unliquidated, do not preclude the allowance of interest on the balance of the plaintiff's claim"].) First, we did not recalculate plaintiff's interest in Monex because it was not part of the trial stipulation. Second, even if we had, it is not the offset amount, i.e., the fees properly expended, that is unliquidated; the attorney fees and costs wrongfully expended by Monex on which the court awarded interest were what not liquidated.

In sum, there was no basis on which to award plaintiff prejudgment interest on the accounting award or the amount for reimbursement of attorney fees and costs.

DISPOSITION

That portion of the judgment denying damages to plaintiff for defendants' breach in failing to value the inventory of coins is reversed and the case is remanded for the court to amend the judgment finding plaintiff did prove damages and is entitled to an award of $1,840,745 plus interest at 10 percent per annum from January 31, 2001. That amount shall be calculated by the trial court and inserted into the judgment. A daily amount from and after the date of the judgment shall also be calculated and included in

the judgment. That portion of the judgment awarding plaintiff interest on $606,415.50 is reversed. The parties not having appealed any other portion of the judgment, it is affirmed in all other respects. The parties shall bear their own respective costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.